

August 13, 2013

VIA E-MAIL AND FEDERAL EXPRESS

Mr. Jerry Lein
Public Utility Analyst
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480



**RE: Courtenay Wind Farm, LLC's Certificate of Site Compatibility Application for the Courtenay Wind Farm in Stutsman County, North Dakota
Case No. PU-13-64**

Dear Mr. Lein:

Thank you for your August 5, 2013 letter regarding information received by the North Dakota Public Service Commission ("Commission") after the public hearing on Courtenay Wind Farm, LLC's ("Courtenay") Application for a Certificate of Site Compatibility ("Application") for the Courtenay Wind Farm ("Project"). For the reasons discussed below, the Commission should not consider the post-hearing submissions as part of the hearing record on Courtenay's Application.

As background, on July 12, 2013, the Commission held a public hearing on Courtenay's Application. On July 22 and 24, 2013, four letters were filed with the Commission: (1) a letter from Kyle C. Wanner, North Dakota Aeronautics Commission (the "Aeronautics Commission"), dated July 23, 2013 (the "Aeronautics Commission letter"); (2) a letter from Robert and Julie Sprague, dated July 18, 2013 (the "Sprague letter"); (3) a letter from James and Sharon Hastings, dated July 18, 2013 (the "Hastings letter"), which was submitted with the Sprague letter; and (4) a letter from Grant Baumgartner, dated July 22, 2013 (the "Baumgartner letter").

None of the four letters should be considered by the Commission because they do not fall within the categories of post-hearing information that may be considered pursuant to N.D.C.C. § 28-32-25. Section 28-32-25 provides that the Commission "may avail itself of competent and relevant information or evidence in its possession or furnished by members of its staff, or secured from any person in the course of an independent investigation conducted by the agency."

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Thus, in order to be information that the Commission may consider, the information must fall into one of three categories: (1) information that the members of the Commission possessed; (2) information provided by a member of the Commission's staff; or (3) information provided by a third party as part of an independent investigation by the Commission. In this case, each of the four letters came from third parties, so they do not fall within categories 1 or 2; furthermore, the letters were not received as part of an independent investigation by the Commission and, as such, do not fall within category 3. For these reasons, the letters are not the type of information that the Commission may consider under N.D.C.C. § 28-32-25.

Additionally, the letters should not be considered because doing so sets an unfavorable precedent for future siting cases. With respect to siting applications, the Commission is required to conduct a public hearing in the county in which any portion of the proposed project is to be located. N.D.C.C. § 49-22-13(1); N.D. Admin. Code § 69-06-01-02(3). The Commission must give the public notice of the hearing by two weeks' publication of the hearing notice in a newspaper in the county in which the project is to be located. N.D.C.C. § 49-22-13(4); N.D. Admin. Code § 69-06-01-02(3)(a). In addition, the Commission must serve a copy of the hearing notice on certain agencies and other entities and on certain local and state officials by mail or electronic mail. N.D.C.C. § 49-22-13(4); N.D. Admin. Code §§ 69-06-01-02(3)(b), (c) and (e) and 69-06-01-05. In this case, the Commission complied with these notice requirements and, as such, provided the public (including the Spragues, the Hastings, and Mr. Baumgartner), as well as agencies and other entities (including the Aeronautics Commission), with the prior notice of the public hearing that is required by law. *See* Affidavit of Service and Affidavit of Publication, Docket Item Nos. 15 and 23, filed May 23, 2013 and July 18, 2013, respectively.

None of the letters' authors indicate that they were unable to attend the public hearing – three of the letters provide no explanation for not attending the public hearing, while the Sprague letter indicates that they knew about the public hearing, but chose not to attend because they did not think they were affected.¹ The Aeronautics Commission offered no explanation for not attending the hearing despite the fact that (1) the Commission served a copy of the hearing notice on the Aeronautics Commission by mail (as indicated in the Commission's Affidavit of Service, dated May 23, 2013, and filed on the same date as Docket Item No. 15), and (2) as a state agency, the Aeronautics Commission is specifically required by statute to "present the position of the agency *at the public hearing* on an application for a certificate," and that "it shall be presumed that a proposed facility will be in compliance with a state agency's rules if such agency fails to present its position on

¹ The Sprague letter could be read as implying that Courtenay should have provided the Spragues with the final layout of the Project prior to the public hearing. However, there is no requirement in N.D.C.C. Ch. 49-22 or the Commission's rules that an applicant provide the final Project layout to individual landowners, either within or outside of the Project footprint (the Spragues are located outside of the Project footprint). The final Project layout was filed with the Commission one week prior to the public hearing, per the Commission's request.

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the proposed site . . . *at the appropriate public hearing.*" See N.D.C.C. § 49-22-16(4) (emphasis added); *see also* N.D. Admin. Code §§ 69-06-01-02(3)(c) and 69-06-01-05(1) (requiring hearing notice to be served on the Aeronautics Commission).

Essentially, the letters' authors ask the Commission to ignore the fact that they had the same opportunity and obligation to attend the hearing as other members of the public and agencies, including those that took time out of their schedules to attend and testify at the public hearing. If the Commission were to consider the four letters, it would tell others that one does not have to attend a public hearing in order to testify on a siting application, regardless of the hearing and notice requirements set forth in the Siting Act and the Commission's rules. As such, it would open the door to similar requests from other individuals and agencies, and they would expect similar treatment. This would result in a siting application process with no certainty for either the public or the applicant.

For these reasons, in addition to the fact that the information is not the type of information that should be considered pursuant to N.D.C.C. § 28-32-25, the Commission should not consider the four letters submitted after the July 12, 2013 public hearing.

Although it opposes consideration of the letters by the Commission, Courtenay is mindful of the concerns raised in the letters, and has contacted each of the letters' authors to discuss their concerns. With respect to the Aeronautics Commission letter, in addition to contacting the agency, Courtenay has also engaged the services of an aviation expert, who has determined that the Project layout will comply with all state and federal aviation regulations.

If you have any questions concerning this letter, please do not hesitate to contact me.

Sincerely,



MOLLIE M. SMITH

MMS/ms
Enclosures

cc: Mitch Armstrong (*via E-mail*)
Kyle C. Wanner, North Dakota Aeronautics Commission (*via U.S. Mail*)
Robert and Julie Sprague (*via U.S. Mail*)
James and Sharon Hastings (*via U.S. Mail*)
Grant Baumgartner (*via U.S. Mail*)
Patrick Smith (*via E-mail*)

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Case No. PU-13-64

**Courtenay Wind Farm, LLC
200.5 MW Wind Energy Center – Stutsman
County
Siting Application**

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) SS
COUNTY HENNEPIN)

Suzanne Anderson, being first duly sworn, does depose and state that on August 13, 2013, she served the following document:

Letter to Jerry Lein, dated August 13, 2013

by placing a true and correct copy of said document in an envelope addressed as follows:

Kyle C. Wanner
North Dakota Aeronautics Commission
P.O. Box 5020
Bismarck, ND 58502-5020

Robert & Julie Sprague
8720 20th Street SE
Courtenay, ND 58426

James & Sharon Hastings
1878 88th Avenue SE
Courtenay, ND 58426

Grant Baumgartner
8965 16th Street SE
Courtenay, ND 58426

and depositing the same, with postage prepaid, in the United States mail at Minneapolis, Minnesota, and by Electronic Mail to the following person at the e-mail addresses shown:

Mitch Armstrong – MArmstrong@smithbakke.com

Suzanne Anderson
Suzanne Anderson

Subscribed and sworn to before me this 13th day of August, 2013.

Martha H. Nagan
Notary Public

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